MALAYAN BANKING BHD v. SUNLIGHT SEAFOOD SDN BHD

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL APPEAL NO: 12BNCVC-66-07-2014]
24 MARCH 2015

CIVIL PROCEDURE: *Action – Discontinuance of – Discontinuing action with leave to file afresh – Whether Sessions Court Judge erred in exercise of discretion when permitting discontinuance of action – Duty on initiator of action to produce evidence to establish case – Evidence not produced in court nor made available – Whether fair for parties to bear their own costs – Whether Sessions Court Judge should award costs to defendant – Rules of Court 2012, O. 21 r. 3(1)*

The plaintiff/respondent had a current account ('current account') with the defendant/appellant at one of the latter's branches. On 22 July 2013, the plaintiff commenced an action against the defendant in relation to 44 cheques which had been allegedly forged by the plaintiff's account officer. The plaintiff pleaded that the defendant was negligent in honouring the alleged forged cheques and sought, among others, to recover the aggregate value of the said 44 cheques of RM655,869.81 that had been wrongfully debited from its current account. During trial, the defendant objected to the admissibility of certain evidences on the ground that the police investigation was still ongoing and that the cheques referred to had not been produced in court nor made available to the defendant. Subsequently, the plaintiff filed the application for leave to discontinue the action with liberty to file afresh an action on the same subject matter and for the parties to bear their own costs. The application was allowed. Hence, this appeal by the defendant against the decision of the Sessions Court Judge in allowing discontinuance of action with liberty to file afresh. The main thrust of the defendant's contention was that the Sessions Court Judge ('SCJ') had erred in granting the plaintiff leave to discontinue the action with liberty as there were no compelling reasons given by the plaintiff to warrant the court permitting the discontinuance of the action. In response, the plaintiff contended that the principal reason it had sought leave to discontinue the action was to ensure that the defendant was not deprived of a fair trial since the cheques and the specimen signatures could not be produced at the trial as all efforts to obtain the same from the police had proved futile. The issue that arose herein was whether the SCJ was correct in the exercise of her discretion under O. 21 r. 3(1) of the Rules of Court 2012 ('ROC') in permitting the plaintiff to discontinue the action it had brought against the defendant with liberty to file a fresh action on the same cause of action and without paying the defendant's costs occasioned by the discontinuance.

Held (allowing defendant's appeal in part):

(1) There is a duty on a plaintiff who initiates an action against a defendant to ensure that he has the evidence to establish the case that he has launched against a defendant. It is totally irresponsible for a plaintiff to initiate an action in the hope that he would be permitted to discontinue the action in the event he is unable to procure the evidence at a later stage. A plaintiff who does so, faces the risk of the court refusing leave to discontinue the action and compelling him to proceed and close his case without this evidence. It would be reasonable to assume that the plaintiff has all the relevant evidence in support of his case when he takes the necessary steps to set down the action for trial. Consequently, a plaintiff who seeks to discontinue an action with leave to file afresh after it has been set down for trial, must have compelling reasons. (para 23)

(2) The plaintiff was aware that the cheques and the specimen signatures were with the police. Common sense would have dictated that the action should not have been set down for trial until the same could be obtained from the police. This it had failed to do, and had found itself in an awkward position where it could not obtain the cheques and specimen signatures which were indispensable to prove its case. The discontinuance was sought by the plaintiff 'to escape by a side door' and avoid the contest because it did not have the documents to prove its case. However, correspondence between the police and the plaintiff revealed that the latter was led by the police to believe that the cheques and the specimen signatures would be made available. Therefore, the SCJ correctly allowed the plaintiff leave to discontinue and file afresh. (para 25)

(3) While the plaintiff was not to be penalised for the predicament in which it had found itself, in the circumstances, there was no justification for depriving the defendant costs thrown away and occasioned by the discontinuance. In conclusion, the SCJ had not erred in holding that the plaintiff was entitled to discontinue the action with liberty but had erred in not awarding the defendant costs. The order of the SCJ that parties bear their own costs was set aside. (paras 26 & 27)

Case(s) referred to:

Covell Matthews & Partners v. French Wools Ltd [1977] 2 All ER 591 ***(refd)***
Fox v. Star Newspaper Co [1898] 1 QB 636 ***(refd)***
Kho Ah Soon & Anor v. Ramanda Sdn Bhd & Ors [2012] 1 LNS 889 HC ***(refd)***
Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan [2002] 3 CLJ 370 CA ***(refd)***
Tan Eng Hoe v. Liang Hooi Kiang [1960] 1 LNS 135 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 21 rr. 2(1), 3(1)

For the appellant - Kenneth Seet Wan Zheng; M/s Lee Hishammuddin Allen & Gledhill
For the respondent - Aidil Khalid; M/s Fuad Abi & Aidil

[Appeal from Sessions Court; Civil Action No: B52-41-07-2013]

Reported by Suhainah Wahiduddin

JUDGMENT

SM Komathy JC:

[1] The issue in this appeal is whether the Sessions Court Judge was right in the exercise of her discretion under O. 21 r. 3(1) of the Rules of Court 2012 ("ROC") in permitting the respondent to discontinue the action it had brought against the appellant with liberty to file a fresh action on the same cause of action and without paying the appellant's costs occasioned by the discontinuance.

[2] For convenience, I shall refer to the parties as they were in the court below.

The Facts

[3] The facts of this appeal fall within a narrow compass. On 12 November 2008, the plaintiff opened a current account (No. 508-298-303-847) ("current account") with the defendant, Malayan Banking Bhd, at its Seri Manjung branch.

[4] On 22 July 2013, the plaintiff commenced an action against the defendant in relation to 44 cheques which had been allegedly forged by the plaintiff's account officer. The forged cheques were paid out of the current account between 3 November 2010 to 31 October 2011.

[5] In its statement of claim, the plaintiff pleaded that the defendant was negligent in honouring the alleged forged cheques and sought for, among others, to recover the aggregate value of the said 44 cheques of RM655,869.81 that had been wrongfully debited from its current account. On 5 September 2013, the defendant filed its defence and the plaintiff then set down the action for trial.

[6] On 19 March 2014, the trial commenced and Inspector Manivanan was the first witness for the plaintiff followed by a government chemist who sought to tender a report that he had prepared in connection with the alleged forgery. The defendant objected to the admissibility of the report, *inter alia*, on the ground that the police investigation was still ongoing and that the original cheques were not before the court.

[7] The Sessions Court Judge, however, overruled the objection and directed the proceedings to continue as there was no objection by the Public Prosecutor to the report being used in the civil proceedings. The plaintiff's counsel then examined the chemist on the features that he had taken into account in making a comparison between the specimen signatures of the

authorised cheque signatories and the original cheques handed to him. The defendant objected to these questions as the 44 cheques referred to in the report and the specimen signatures had not been produced in court nor made available to the defendant. The Sessions Court then stood down the trial to enable the parties to peruse the report. The trial was later adjourned for mediation.

[8] On 9 April 2014, the plaintiff's counsel sought an adjournment to file an application to withdraw the action. On 15 May 2014, the plaintiff filed the application for leave to discontinue the action with liberty to file a fresh action on the same subject matter and for the parties to bear their own costs. The application was allowed. Hence, this appeal by the defendant against the decision of the Sessions Court Judge to allow discontinuance with liberty.

Decision Of Court Below

[9] In her grounds of judgment, the learned judge gave the following reasons for allowing the plaintiff's application, namely:

(i) Bahawa "dengan pendapat ahli kimia yang mengesahkan bahawa tandatangan atas 44 keping cek berkenaan adalah palsu, Defendan sepatutnya diberi peluang untuk melihat atau memeriksa cek-cek berkenaan, malahan merujuk kepada pakar mereka sendiri untuk membantu kes pembelaan",

(ii) Bahawa "ketiadaan cek-cek berkenaan di mahkamah sudah tentu tidak dapat memberi satu perbicaraan yang adil kepada kedua-dua pihak",

(iii) Bahawa "adalah hanya adil untuk mahkamah membenarkan penarikan balik kes plaintif ini dengan kebebasan fail semula",

(iv) Bahawa "kegagalan memperolehi cek-cek berkenaan untuk perbicaraan kes sivil ini bukan salah plaintif",

(v) Bahawa "plaintif tidak harus dinafikan haknya untuk datang kembali ke mahkamah untuk menuntut hak mereka apabila plaintif dapat memperolehi cek-cek berkenaan nanti",

(vi) Bahawa "plaintif tidak harus di "hukum" dengan apa-apa kos pada peringkat ini memandangkan penarikan balik kes ini bukan atas apa-apa silap salah plaintif".

Contentions Of Parties

[10] The main thrust of the defendant's contention was that the Sessions Court Judge had erred in granting the plaintiff leave to discontinue the action with liberty. There were no compelling reasons given by the plaintiff to warrant the court permitting the discontinuance of the action. It ought to have been rejected as it was only sought after the trial had commenced and the testimony of two witnesses taken. The claim formulated against the defendant bank was based on negligence and forgery. It was a serious charge and the defendant had done all that was necessary to defend the action. The

plaintiff should not have commenced this action and set it down for trial, if it was not ready to proceed with the trial. To seek a discontinuance at this late stage was unfair and unjust.

[11] In the alternative, the defendant contended that discontinuance if allowed should be without liberty and for the plaintiff to pay its costs. The defendant contended that it was undisputable that the decision to discontinue the action was taken when the plaintiff realised halfway through the trial that it was bound to lose the case without the cheques and specimen signatures. To avert this result, and to deprive the defendant the advantages it would have gained if the trial had proceeded, the plaintiff sought discontinuance. The Sessions Court Judge therefore had erred in permitting the plaintiff to bring another action on the same facts and not ordering the plaintiff to pay its costs occasioned by the discontinuance.

[12] In response, the plaintiff contended that the principal reason it had sought leave to discontinue the action was to ensure that the defendant was not deprived of a fair trial. The cheques and the specimen signatures could not be produced at the trial as all efforts to obtain the same from the police had proved futile. In the course of the trial it became evident that the non-availability of the said documents would be disadvantageous to the defendant in the preparation and conduct of its case. The defendant would not have the opportunity of making a comparison between the signatures on the 44 cheques and the specimen signatures of the authorised cheque signatories, and to procure its own expert report on the alleged forgery without the originals being made available. The discontinuance, the plaintiff argued, was not to obtain a tactical advantage.

[13] The plaintiff also contended that the Sessions Court Judge was right in ordering each party to bear its own costs as the plaintiff ought not be penalised for the refusal of the police to release the cheques and specimen signatures. It had done all that was necessary to procure these documents from the police, but to no avail. Several letters were written to the police in this connection and were told it would be made available. Consequently, the plaintiff had no choice but to commence the action and to proceed with the trial by calling the chemist to establish its case.

Discontinuance Of An Action

[14] Discontinuance of an action is the process by which a plaintiff (or defendant by counterclaim) may put an end to the whole of his claim in the proceedings in question. A party may discontinue an action without leave of the court at any time not later than 14 days after service of the defence. Any discontinuance thereafter requires the sanction of the court and the court may impose terms such as costs and the bringing of a subsequent action. This is encapsulated in O. 21 r. 2(1) and r. 3(1):

A Rule 2(1)

The plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than fourteen days after the service of the defence on him or, if there are
B two or more defendants, of the defence last served, by serving a notice in Form 32 to that effect on the defendant concerned.

Rule 3(1)

Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any
C particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.

D

[15] In exercising the powers in respect of terms to be imposed in permitting discontinuance, the court is entitled to refuse leave to file afresh whether or not limitation has set in. The court has a wide discretion and is empowered to allow discontinuance on terms by limiting or forbidding the possibility of resurrecting the discontinued claim in new proceedings that no
E other action shall be brought.

[16] It is a fundamental rule that a litigant should not be compelled to litigate against his will. The English Court of Appeal case in the case of *Fox v. Star Newspaper Co* [1898] 1 QB 636, considered the rationale for requiring
F a litigant to seek leave of the court to discontinue an action. Chitty LJ explained the rationale (at p. 639):

The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer *dominus litis*, and it is for the judge to say
G whether the action shall be discontinued or not and upon what terms. … The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another
H action for the same subject-matter.

[17] In *Covell Matthews & Partners v. French Wools Ltd* [1977] 2 All ER 591, the court discussed the principles that should govern the exercise of the court's discretion. It was held at p. 594:

I The principles to be culled from these cases are, in my judgment, that the court will, normally at any rate, allow a plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The court should therefore grant leave, if it can without injustice to the

> defendant, but in doing so should be careful to see that the defendant is not deprived of some advantage which he has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved.

[18] These principles have been approved and applied by the Malaysian courts. In *Tan Eng Hoe v. Liang Hooi Kiang* [1960] 1 LNS 135; [1961] 1 MLJ 119, the appellant sought an adjournment of the trial to retain senior counsel. When it was refused by the trial judge, he sought to leave to discontinue the action with liberty to bring a fresh action on the ground that he had by oversight put himself in a difficult position. This was also refused and his action was dismissed on the ground that he had failed to prove his claim. He appealed. In dismissing his appeal, the Court of Appeal observed (at p. 120 (MLJ)):

> As to discontinuance, it is again well settled that it lies entirely within the Judge's discretion whether or not to allow a plaintiff to discontinue with the right of bringing another action. The object of Order 26 rule 1 is that "after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into Court, shall not be able to escape by a side door and avoid the contest … and it is for the Judge to say whether the action shall be discontinued or not and upon what terms" per Chitty LJ in *Fox v. Star Newspaper Co* [1898] 1 QB 636. With respect, I think Smith J. rightly held that the reason for not allowing an adjournment was a sufficient reason for not allowing discontinuance which, if permitted, would have rendered the respondent liable to further harassment by the appellant with another action on the same subject matter.

[19] In *Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan* [2002] 3 CLJ 370; [2002] 3 MLJ 155, the plaintiff brought an action seeking a number of declarations. They were all directed at a meeting of the third defendant which the defendants intended to convene for the purpose of discussing certain allegations relating to the judiciary which they considered matters of public interest. The plaintiff stopped that meeting by means of an interlocutory injunction. The trial then proceeded. At the close of the proceedings, the learned judge reserved judgment. Later, on a date fixed for mention of the case, the learned judge advised the parties to resolve the differences between them. The plaintiff then made an application to discontinue the suit. That application came up for hearing before the learned judge. It was strenuously opposed by the defendants. The learned judge permitted discontinuance. The defendants appealed.

[20] The appeal was allowed by the Court of Appeal. The court in its judgment set out the guidelines that must be followed in exercising discretion under O. 21 r. 3 (at pp. 376-377 (CLJ); pp. 161-162 (MLJ)):

> We perceive the facts of this appeal to lie upon the intersection of two important and fundamental principles of our adjectival law. The first is the right of the initiator of an action to withdraw the process by which he invoked the court's jurisdiction. The second is the undoubted right of a defendant to press his case forward to judgment especially where he

A considers himself to be *dominus litis*. As in all cases of such nature, where important opposing interests come into conflict, the lines of decision become blurred or at least are not entirely clear.

…

B What comes across clearly from the authorities that they have referred to is the fact that a judge exercising his power under O. 21 r. 3 which permits discontinuance has a wide discretion. But it is not an unprincipled discretion. There are important guidelines that act as beacons, guiding him through those blurred areas of which we spoke a moment ago.

C One of these guidelines is that if a defendant is *dominus litis*, the general rule is to refuse leave to discontinue. See *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124. Another guideline is that where the case is at a very advanced stage, care should be taken not to permit discontinuance. And what constitutes an advanced stage depends on the facts and circumstances of each case as illustrated by the case of *Fox v. Star Newspaper Company* [1898] 1 QB 636. Another consideration; yet D another guideline; which a judge ought to bear in mind is any interim or interlocutory advantage that the plaintiff may have gained between the date of issue of the writ and the point of time which he seeks to discontinue: *O'Neal v. Mann* [2000] FCA 1680.

E The upshot is that it all depends on the facts and circumstances of each case bearing in mind that one ought not to depart from the outer parameters established by the guidelines to which we have referred.

[21] In *Kho Ah Soon & Anor v. Ramanda Sdn Bhd & Ors* [2012] 1 LNS 889; [2012] MLJU 330. There, the case was set down for trial. On the morning of the first day of trial, the plaintiff's counsel informed the court that his F instruction was to withdraw the suit with liberty to file afresh. The court held that the move to withdraw the action at an advanced stage was tantamount to an acknowledgement or admission of defeat by the party seeking to avoid further prosecution of its claim against the adversary. Accordingly, the court allowed the action to be discontinued but without liberty to file afresh.

G **[22]** It is abundantly clear from authorities to which I have been referred to that the granting of leave to discontinue is not a mere formality.

Discussion And Decision

[23] There is a duty on a plaintiff who initiates an action against a H defendant to ensure that he has the evidence to establish the case that he has launched against a defendant. It is totally irresponsible for a plaintiff to initiate an action in a case in the hope that he would be permitted to discontinue the action in the event he is unable to procure the evidence at a later stage. A plaintiff who does so, faces the risk of the court refusing leave I to discontinue the action and compelling him to proceed and close his case without this evidence. It would be reasonable to assume that the plaintiff has all the relevant evidence in support of his case when he takes the necessary

steps to set down the action for trial. Consequently, in my judgment, a plaintiff who seeks to discontinue an action with leave to file afresh after it has been set down for trial, must have compelling reasons.

[24] I turn now to examine the conduct of the plaintiff in initiating the action and setting it down for trial. It ought to have been apparent to the plaintiff and its legal advisers that it would not be able to prove its case for negligence and forgery without the cheques and the specimen signatures. The plaintiff was aware that the cheques and the specimen signatures were with the police. Surely, common sense would have dictated that the action should not have been set down for trial until the same could be obtained from the police. This it had failed to do so, and found itself in an awkward position where it could not obtain the cheques and specimen signatures which were indispensable to prove its case and the Sessions Court Judge was not inclined to allow an adjournment of the trial for any reason. It cannot be gainsaid that without the cheques and the specimen signatures the plaintiff's case was bound to fail. The plaintiff had perforce to seek permission to discontinue the action.

[25] On the facts, it is clear to me that the discontinuance was sought by the plaintiff "to escape by a side door" and avoid the contest because it did not have the documents to prove its case. It was patently irresponsible on the part of the plaintiff to have instituted this action without first obtaining the cheques and specimen signatures. I would have been minded to allow the appeal to prevent the plaintiff from harassing the defendant with further litigation on the same subject matter, if not for some correspondence in this case. The correspondence was between the police and the plaintiff and it revealed that the latter was led by the police to believe that the cheques and the specimen signatures would be made available. I therefore find that the Sessions Court Judge correctly allowed the plaintiff leave to discontinue and file afresh.

[26] Whilst I agree with the Sessions Court Judge that the plaintiff is not to be penalised for the predicament in which it found itself, I am unable to agree with her that in the circumstances it was fair for parties for to bear their own costs . There is no justification for depriving the defendant costs thrown away and occasioned by the discontinuance.

Conclusion

[27] In conclusion, therefore, I must hold that the Sessions Court Judge had not erred in holding that the plaintiff was entitled to discontinue the action with liberty but had erred in not awarding the defendant costs. In these circumstances, I would therefore allow the defendant's appeal in part. The order of the learned Sessions Court Judge that parties bear their own costs is set aside. The plaintiff will pay the defendant's costs here and below in the sum of RM20,000.